

ORIGINAL



0000076377

BEFORE THE ARIZONA POWER PLANT
RECEIVED
AND TRANSMISSION LINE SITING COMMITTEE

2007 OCT -3 P 3:40

IN THE MATTER OF THE
APPLICATION OF
NORTHERN ARIZONA ENERGY,
LLC FOR A CERTIFICATE OF
CONVENIENCE AND NECESSITY
AUTHORIZING CONSTRUCTION OF
A 175 MW NATURAL GAS-FIRED
SIMPLE CYCLE GENERATING
FACILITY AND ASSOCIATED
TRANSMISSION LINE TO THE
WESTERN AREA POWER
ADMINISTRATION ("WAPA")
GRIFFITH SWITCHYARD.

AZ CORP COMMISSION
DOCKET CONTROL

DOCKET NO. L-00000FF-07-0134-00133

STAFF'S BRIEF ON JURISDICTION
AND NEED

Arizona Corporation Commission

DOCKETED

OCT 03 2007

DOCKETED BY

At the request of the Siting Committee, the Legal Division submits this brief to address two questions raised in the course of these proceedings: (1) Does ARS § 40 - 360 *et seq.* ("Siting Statutes") provide jurisdiction over the above captioned application? (2) Does the Siting Committee have authority to make recommendations and findings as to need for a project? The short answer to both questions is yes.

JURISDICTION OVER THE APPLICATION

Under ARS § 40 - 360.07.A, "[n]o utility may construct a plant or transmission line within this state until it has received a certificate of environmental compatibility from the committee with respect to the proposed site, affirmed and approved by an order of the commission. . . ." The application requests a CEC for the project described as four simple cycle gas fired generating units, 45 MW each, for a total capacity of 175 MW (hereinafter referred to as the "Northern Arizona Energy Project" or "NAEP"). The issue is whether the four 45 MW generating units totaling 175 MW can be considered a "plant" under the definition found in ARS § 40-360(9) which states: "Plant" means each separate thermal electric, nuclear or hydroelectric generating unit with a nameplate rating of one hundred megawatts or more for which expenditures or financial commitments for land

acquisition, materials, construction or engineering in excess of fifty thousand dollars have not been made prior to August 13, 1971.”

At first impression, the definition of plant that refers to “each separate” unit taken out of the context of the circumstances of this case may appear to preclude siting jurisdiction because each generating unit considered separately is less than 100 MW. The problem with that interpretation is it ignores the facts in the evidentiary record that demonstrate the four simple cycle gas fired generating units as a whole provide more than 100 MW of electric power to wholesale load.

This interpretation also ignores the unique facts of this case. The four simple cycle gas fired generating units considered together could be viewed as an addition to the existing Griffith Plant. A separate CEC is being sought only “because of future ownership and financing rights of the NAEP.”¹ The Application states the following in this regard:

A business combination is pending between LS Power, the upstream owner of Applicant and Griffith Owner and Dynegy Corporation. Upon completion of such transaction, operating assets such as Griffith will be owned by Dynegy and development projects such as the Northern Arizona Energy Project will be separately owned by a Joint Venture of LS Power and Dynegy. Due to this separate ownership structure and the associated unique equity and financing rights and obligations, a separate CEC is required.²

In all respects, however, the close nexus with the Griffith plant is clear. The NAEP is located “on private land adjacent to an existing power generation facility and is able to utilize existing infrastructure that was developed for the I-40 Industrial Corridor and the Griffith project.”³ The NAEP is “situated in an area evaluated in previous environmental studies for the Griffith project.”⁴ Because an Environmental Impact

¹ Application at ES-1.

² *Id.*

³ *Id.*

⁴ Application at ES-1.

Statement (“EIS”) was issued for the same geographic area, NAEP was only required to perform an Environmental Assessment (“EA”).

The NAEP uses and relies on the existing Griffith plant’s land and water as well as technical facilities to provide energy. Existing infrastructure for the gas, water and electric interconnections and access are available to the NAEP within its property boundary or the adjacent property containing the existing Griffith plant.⁵ No new laterals or other off-site infrastructure development are required for the Project thereby minimizing the environmental impacts associated with the NAEP.⁶ Water supply for the NAEP will be obtained from Griffith through a physical interconnection with the Griffith water treatment and recycling systems. Additionally, under NAEP’s proposed design it would be interconnected with the existing 230 kV Griffith Substation through a double circuit 230 kV transmission line.

The Applicant could not have added 175 MW facilities to the Griffith CEC without either seeking an amendment or filing this application. The Griffith CEC was granted after balancing the public interest for the need for the power against the project’s environmental impacts. The addition of 175 MW facilities may well change that balance and an Applicant should not be in a position to unilaterally make the decision to alter an existing CEC without Committee consideration and Commission review and approval.

This view is reflected in the legislative history and statutory notes for the Siting Statutes. In relevant part, the Legislature found that “. . . it is essential in the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the state which such new facilities might cause.” ARS § 40-360, Laws 1971, Ch. 67 § 1.

In light of the purpose of the Siting Statutes, it appears that the circumstances of this matter compel jurisdiction to consider the Application under ARS 40-360 et seq. To

⁵ *Id.*

⁶ Application at p. ES-1.

do otherwise would not appropriately recognize the public interest at stake in these proceedings and the close nexus to the Griffith plant.

However, if the Committee determines from its consideration of this case that jurisdiction does not rest over the Application because of its interpretation of the definition of plant found in ARS 40-360 (9), there is an alternative to dismissal of the application. Staff requests that the Committee reach a decision on the merits of the CEC, and refer that decision to the Commission with additional findings that the Committee found that there was a lack of jurisdiction over the application. That would provide the Commission with the Committee's findings as well an evidentiary record upon which to base the Commission's determinations on these issues.

COMMITTEE'S AUTHORITY TO CONSIDER NEED

The statutory procedure for line siting in Arizona is a two-step process.⁷ The Committee issues a CEC after considering the factors listed in A.R.S. § 40-360.06. The Commission then may approve, modify or reverse the Committee's decision. The Commission's decision must be based on the record developed by the Committee.⁸

As a practical matter, the Committee must develop a record for the Commission to fulfill its statutory duties in balancing the public interest in siting cases under A.R.S. § 40-360.07(B).⁹ Nevertheless, in *Grand Canyon Trust v. Arizona Corporation Commission*, 210 Ariz. 30, 107 P.3d 356 (App. 2005), the Court of Appeals of Arizona held that A.R.S. § 40-360.07(B) does not govern Committee proceedings.¹⁰ The Court

⁷ See A.R.S. § 40-360.07(A) ("No utility may construct a plant or transmission line within this state until it has received a certificate of environmental compatibility from the committee with respect to the proposed site, affirmed and approved by an order of the commission. . . .").

⁸ A.R.S. § 40-360.07(B).

⁹ The balancing test requires the Commission to "balance, in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereon on the environment and ecology of the state." *Id.*

¹⁰ *Grand Canyon Trust v. Arizona Corporation Commission*, 210 Ariz. at 35, 107 P.3d at 361.

also found that the express language of A.R.S. § 40-360.07(B) does not require balancing unless a party contests a decision of the Committee.¹¹ Notwithstanding the Court's reasoning, the Commission does not issue an order unless it is in the public interest.

In dicta, the *Grand Canyon Trust* Court also stated that the Committee could consider need should it choose to do so. The Court reasoned that:

The factors the Siting Committee must consider in deciding whether to issue a CEC are set forth in A.R.S. § 40-360.06. *These factors contain sufficient breadth to allow the Siting Committee to consider the need for power as a factor in considering a CEC application should it choose to do so.* The statute also allows the Siting Committee to "impose reasonable conditions upon the issuance of a" CEC. A.R.S. § 40-360.06(A).¹²

A factor, however, not considered by the Court was the express language of A.R.S. § 40-360.06(A)(9) which provides that the Committee shall consider "[a]ny additional factors which *require* consideration under applicable federal and *state laws pertaining to such site.*"¹³ Arguably because need must be considered by the Commission under the balancing test contained in A.R.S. § 40-360.07, and it is applicable to all plants or lines subject to the siting process, the Committee must consider need as well.

Practical considerations related to the Commission's review, also warrant the Committee's consideration of need. The Commission is bound by the record created by the Committee on these matters. Since the Commission considers need in its evaluation, from a practical perspective the Committee would at minimum be required to develop a record on need.

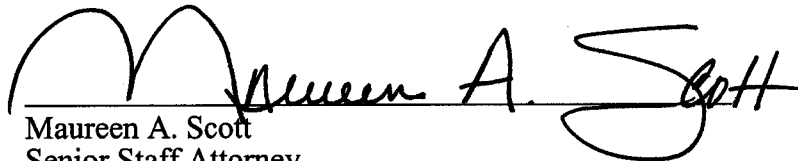
¹¹ *Id.*

¹² *Grand Canyon Trust v. Arizona Corporation Commission*, 210 Ariz. at 35, 107 P.3d at 361, n. 7 (emphasis added).

¹³ A.R.S. § 40-360.06(A)(9) (emphasis added).

In summary, because the Commission relies upon the record created by the Committee in conducting its review under Section 40-360.07, an evaluation or discussion of need before the Committee, even if it does not make a specific finding thereon, would provide an evidentiary record for the Commission to consider. However, Staff believes that findings of fact would aid the Commission in the discharge of its statutory obligations.

RESPECTFULLY submitted this 3rd day of October, 2007.

A handwritten signature in black ink, appearing to read "Maureen A. Scott". The signature is stylized with large, flowing loops and is written over a horizontal line.

Maureen A. Scott
Senior Staff Attorney
Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Original and Twenty-Eight (28) copies
of the foregoing filed this 3rd day of
October 2007 with:

Docket Control
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Copy of the foregoing mailed
this 3rd day of October 2007 to:

Greystone Arcadis
630 Plaza Drive
Highlands Ranch, Colorado 80129

Copies of the foregoing e-mailed
this 3rd day of October 2007 to:

Laurie Woodall, Chairman
Arizona Power Plant & Transmission
Line Siting Committee
1275 West Washington
Phoenix, Arizona 85007
Laurie.Woodall@azag.gov

Jay I. Moyes
Moyes Storey
Viad Corporate Center
1850 North Central Avenue
Suite 1100
Phoenix, Arizona 85004
jimoyes@lawms.com

Kenneth C. Sundlof, Jr.
Jennings, Strouss & Salmon, PLC
The Collier Center, 11th Floor
201 East Washington Street
Phoenix, Arizona 85004-2385
Sundlof@sslaw.com

Jack Ehrhardt
4105 N. Adams St.
Kingman, Arizona 86409
hualapaiplanning@citlink.net
cerbatnp@citlink.net

